UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AJA TERMINE, et al.,

Plaintiffs,

v.

WILLIAM S. HART UNION HIGH SCHOOL DISTRICT and WESTMARK SCHOOL,

Defendants.

CV 02-1114 SVW (MANx)

ORDER RE DEFENDANT'S FURTHER ACCOUNTING OF ATTORNEYS' FEES AND DENYING IN PART PLAINTIFFS' MOTION FOR FEES [177]

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

I. INTRODUCTION & BRIEF SUMMARY OF LITIGATION

This case involved a dispute between Plaintiff Aja Termine ("Aja"), her mother Karen Termine (collectively "Plaintiffs") and Defendant William S. Hart Union High School District ("Defendant") over Aja's educational placements under the Individuals with Disabilities Education Act ("IDEA"). The dispute began when Aja transferred into the Hart School District in the fall of 2001. On December 27, 2001, Plaintiffs filed for an administrative due process hearing before the California Special Education Hearing Office ("SEHO"). Plaintiffs requested that the SEHO issue a "stay-put" order which would maintain Aja in her current placement until the dispute was resolved. However, SEHO denied the stay-put order.

206

Plaintiffs then sought a judicial determination by this Court as to what was the appropriate "stay-put" placement for Aja. In the meantime, SEHO issued a decision regarding the parties' dispute on July 3, 2002. This Court then joined the parties' cross-appeals of the SEHO case with the stay-put case.

On June 24, 2005, this Court entered Judgment for Plaintiffs. Plaintiffs subsequently moved for attorneys' fees reimbursement pursuant to the IDEA under 20 U.S.C. § 1415(i)(3)(B). On January 13, 2006, this Court issued an order that in large part granted the requested fees ("January Order"). However, in considering Defendant's arguments that a fee reduction might be appropriate for selected fees, this Court requested further accounting from the Defendant before issuing a final decision regarding those fees. This order considers the further accounting by Defendant submitted in response to the January Order.

As further explained below, the Court GRANTS Defendant's request that the requested fee award be reduced by (1) the fees incurred with respect to the Westmark settlement; and (2) the fees incurred on or after January 24, 2004, the date of the 2004 SEHO decision that is the subject of a case before Judge Otero. The Court also DENIES Plaintiffs' request for expert fees.

II. ATTORNEYS' FEES

In its opposition to Plaintiffs' motion for attorneys' fees, Defendant argued that the fees should be reduced based on (1) this Court's finding that Plaintiffs had unreasonably protracted the proceedings by delaying Plaintiff's initial Individual Education Program ("IEP") meeting, and (2) Plaintiffs' time spent on discrete

tasks after the SEHO decision that were unrelated to the litigation with the Defendant. This Court found that both contentions had some merit and ordered Defendant to submit a detailed statement of the hours it believes fall into those two categories.

A. Fees spent delaying the initial IEP meeting with Defendants

Under the IDEA, all state and local education agencies are required to provide to students with disabilities free appropriate public education. 20 U.S.C. § 1412. Appropriate placements are determined through the IEP process. 20 U.S.C. § 1414. In an Order issued on February 14, 2002, this Court determined that Plaintiffs had unreasonably delayed the initial IEP meeting with Defendant. A brief summary of the facts that led to this finding follows.

Pursuant to a prior February 28, 2001, IEP with the Glendale School District, Aja was enrolled for the 2001-2002 school year at Westmark, a nonpublic school. On October 3, 2001, Aja enrolled in Defendant's district after the family relocated. Under the IDEA, Defendant was required to either provide placement in accordance with the existing IEP, or formulate a new IEP. In early October, 2001, Defendant made several attempts to set up an IEP meeting with Plaintiffs. Receiving no response, Defendant held an IEP meeting on October 18, 2001 without Plaintiffs present. At the meeting, Defendant determined that its internal programs were sufficient to meet Aja's needs and therefore would not pay for Aja's current, nonpublic placement at Westmark. Consequently, Westmark informed Plaintiffs that it would disenroll Aja from its program for lack of payment. Plaintiffs finally filed for a due process hearing with SEHO on December 27, 2001. On February 6, 2002, Plaintiffs filed an

application with this Court for a temporary restraining order and preliminary injunction requiring Defendant to pay for Aja's placement at Westmark. On February 14, 2002, this Court denied the application.

Among the findings in its February 14, 2002 Order, this Court found that Plaintiffs had shown a clear intent to preclude any possibility that a new agreed-upon IEP be created. Plaintiffs did not attend the Defendant's October 18th meeting, did not accept the District's invitation to conduct another IEP meeting, and did not immediately file for a SEHO due process hearing. Plaintiffs did not act until they realized that Defendant was not going to pay for Aja's tuition at Westmark. Thus, this Court concluded that Plaintiffs had engaged in unreasonable delay by failing to communicate with Defendant during the months of October, November and December 2001.

Ultimately, the IEP that Defendants initially sought to schedule in October, 2001 did not occur until August 21, 2002. Based on this, Defendant has identified a total of $5,141.00 in fees and costs that it argues resulted from Plaintiffs' delay. In response, Plaintiffs point to the plain language of this Court's January 13, 2006 Order. It provides:

> Plaintiff's attorneys' billing records (those submitted to the Court) appear to include the time period during which the SEHO and this Court found that Plaintiffs and Plaintiffs' counsel inappropriately protracted proceedings (October 21, 2001 through mid-February 2002). If practical to separate out the relevant time, the Court deems it appropriate to reduce the fee recovery

for those hours spent delaying the initial IEP meeting with the District.

(January Order at 11-12.) As Plaintiffs correctly point out, Defendant failed to identify a single billing item in its accounting that occurred during the relevant time period identified by this Court. All of the time entries identified by Defendant are dated after March 8, 2002. By its terms the January Order confined the permissible fee reductions to time entries that occurred during the period of inappropriate delay previously identified by this Court. Thus, the January Order is only concerned with time entries made in furtherance of delay from October 21, 2001 through mid-February 2002.[1] Contrary to Defendant's assertion, it does not encompass time entries reflecting efforts to schedule an IEP after mid-February, 2002 that may or may not have been caused by the initial delay.

Because Defendant has not identified any time entries in the relevant time period, Defendant's request for a reduction in the total amount of $5,141.00 with respect to the delay in scheduling the initial IEP meeting is DENIED.

B. Fees unrelated to the litigation with Defendant

Defendant has identified two categories of fees that it believes are unrelated to this action: (1) fees related to Plaintiffs' settlement with Westmark, and (2) fees related to Aja's placement for the 2003-2004 school year. Defendant alleges it is not responsible for $4,760.51 in fees and costs related to the first category and $15,298.02 in fees and costs related to the second category.

[1] Mid-February approximates the date this Court issued its February 14, 2002 order.

1. Fees related to Plaintiffs' settlement with Westmark

Plaintiffs named Westmark as an additional defendant after it became apparent that Defendant did not intend to pay for Aja's Westmark tuition. Westmark moved to be dismissed from the case on February 27, 2002. However, the Court never ruled on this motion. Plaintiffs and Westmark apparently settled in the spring of 2002; Westmark has not been an active participant in the litigation since that time. According to Plaintiffs, Westmark allowed Aja to remain in school while Plaintiffs' litigation with Defendant was pending even though it was not being paid on a current basis. Plaintiffs' attorneys incurred $4,760.51 in fees and costs related to the Westmark settlement. The Westmark settlement remains private because it was never filed with this Court. However, Westmark was never dismissed from the case and it still remains a defendant on the record.

Defendant argues Plaintiffs cannot recover the fees relating to the Westmark settlement because they were not a prevailing party with respect to Westmark, as defined by the Supreme Court in Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001). However, Defendant has not presented any authority showing why Plaintiffs must be a prevailing party as to Westmark in order for Plaintiffs to recover the fees from *Defendant*. Indeed, Plaintiffs do not argue that they prevailed over Westmark. Instead, Plaintiffs argue that they should be awarded fees for their settlement with Westmark because Defendant was the reason Plaintiffs were forced to incur any attorneys' fees with respect to Westmark. Westmark was named as an additional defendant only because of Defendant's failure

to comply with the IDEA. According to Plaintiffs, all fees related to Westmark are a direct result of their litigation with Defendant. Thus, the issue seems not to be whether Plaintiffs prevailed over Westmark, but whether Plaintiffs' settlement negotiations with Westmark were sufficiently related to their successful litigation against Defendant to merit Defendant paying the fees for those negotiations.

Plaintiffs' claims against Westmark and its claims against Defendant clearly stemmed from a common set of facts, in that Plaintiffs would not have had claims against Westmark if Defendant had not refused to foot the Westmark bill for Aja. However, this causal relationship does not meet the Court's understanding of the legal standard for relatedness for purposes of attorneys' fees. The relatedness requirement originated in Hensley v. Eckerhart, 461 U.S. 424 (1983). Hensley held that a prevailing plaintiff cannot recover attorneys' fees under 42 U.S.C. § 1988 for time expended on unrelated claims. 461 U.S. at 434-35. The Ninth Circuit and other courts have expanded upon Hensley to hold that plaintiffs may be compensated for unsuccessful stages of ultimately successful litigation, Cabrales v. County of Los Angeles, 935 F.2d 1050, 1052 (9th Cir. 1991); for time spent on matters outside the litigation effort that preserved a litigation remedy, Gilbrook v. City of Westminster, 177 F.3d 839, 876 (9th Cir. 1999); for work with respect to a different party than the paying defendant when that work was not directly related to the plaintiff's claims against the paying defendant, Rode v. Dellarciprete, 892 F.2d 1177, 1185 (3d Cir. 1990); Ark. Cmty. Orgs. For Reform Now v. Ark. State Bd. of Optometry, 468 F.Supp. 1254,

1258-59 (E.D. Ark. 1979). The common denominator in all of these nuances of Hensley is that the awarded fees advanced the litigation for which the plaintiff had been held the prevailing party. The Westmark settlement did not advance Plaintiffs' litigation against Defendant – it was solely about tuition. Accordingly, the fees incurred with respect to the Westmark settlement shall be deducted from the fee award.

2. *Fees for time spent on discrete tasks after the SEHO decision*

Finally, Defendant argues that Plaintiffs should not be allowed to recover fees for time spent on Plaintiffs' efforts to enforce the SEHO decision. According to Defendant, Plaintiffs have requested a total of $15,298.02 in fees and costs that are unrelated to the case before this Court. Specifically, Plaintiffs argue that these fees are the subject of a case pending before Judge Otero, CV 04-2930 SJO (CTx). The case before Judge Otero involves substantially similar facts and is largely a continuation of the case before this Court. Thus, a brief outline of the relevant facts and how the cases fit together follows.

On July 3, 2002, SEHO issued its first decision with respect to Aja's placement. The SEHO decision was appealed to this Court ("2002 SEHO Decision"). The parties' appeal of the 2002 SEHO Decision to this Court primarily concerned a determination of what was the proper stay-put placement for Aja. However, the 2002 SEHO Decision also instructed the parties to convene a new IEP meeting for Aja so that a permanent placement could be determined. Two IEP meetings were held after the 2002 SEHO Decision: one on August 21, 2002 and one on May 2, 2003. Plaintiffs' explanation for the two meetings (which is not

supported by evidence but which Defendant does not contradict (or acknowledge)) is that the August 21, 2002 meeting did not comply with the instructions given in the 2002 SEHO Decision, thus necessitating the second meeting in May 2003.[2] A second IEP was held on May 2, 2003, which Plaintiffs seem to concede met the requirements of the 2002 SEHO decision. Controversy between the parties continued, apparently regarding the mandate of the May 2, 2003 IEP meeting, leading to the January 29, 2004 SEHO decision ("2004 SEHO Decision"), at which SEHO ruled in Plaintffs' favor. As a result, Defendant appealed portions of the 2004 SEHO Decision to Judge Otero. In that litigation, the Termines, as defendants, moved to dismiss the School District's complaint. On October 7, 2005, Judge Otero issued an Order granting the Termines' motion to dismiss. On October 14, 2005, the Termines moved for attorneys' fees in that action. However, because the School District has appealed Judge Otero's decision to the Ninth Circuit, Judge Otero has stayed the Termines' motion pending resolution of the appeal.

Defendant argues that its liability for time entries related to the 2002 SEHO Decision cannot extend past August 21, 2002, the date of the first IEP meeting held pursuant to the 2002 SEHO Decision. Plaintiffs, on the other hand, argue that they are entitled to fees through September 2004, as all of these fees were incurred either to have a meaningful IEP meeting, as mandated by the 2002 SEHO Decision, or to try to enforce the IEP decided upon at the second IEP meeting, the one on May 2, 2003. As discussed below, the Court deems it

---

[2] The 2004 SEHO Decision found that Defendant improperly delayed this meeting. This finding was upheld by Judge Otero in his October 7, 2005 Order.

appropriate to allow fees up to the January 2004 SEHO Decision, but not after that. Fees incurred after the 2004 SEHO Decision, which was the subject matter of the case before Judge Otero, are more properly addressed by Judge Otero.

Federal courts may award attorneys' fees under 42 U.S.C. § 1988 for "time spent on administrative proceedings to enforce the civil rights claim prior to the litigation." N.C. Dept. of Transp. v. Crest St. Cmty. Council, Inc., 479 U.S. 6, 15 (1986). "Moreover, even if the prior proceeding is not a proceeding to enforce one of the § 1988 civil rights laws, the discrete portion of the work product from the administrative proceedings that was both useful and of a type ordinarily necessary to advance the civil rights litigation . . . can be part of the attorney's fees awarded under § 1988." Id. (internal citations and quotations omitted); cf. Stewart v. Gates, 987 F.2d 1450, 1452 (9th Cir. 1993) (holding that post-judgment enforcement work is compensable as long as it is useful and of a type that is ordinarily necessary to secure compliance with the court's orders).

Under the standards articulated above, Plaintiffs are entitled to compensation for their work in attempting to enforce the 2002 SEHO Decision. The primary issue is at what point Plaintiffs' enforcement efforts were no longer useful and of a type necessary to advance the purpose behind the civil rights litigation in this Court. At both the administrative and district court levels, the issue in this case was the same - determining the proper placement for Aja. The 2004 SEHO Decision found that Defendant had failed to offer or provide Aja free appropriate public education ("FAPE") for the 2002-2003 school year as described in the August 21, 2002 IEP, and that the failure to

provide FAPE continued for the 2003-2004 school year. This finding was upheld by Judge Otero in his October 7, 2005 Order granting the Termines' motion to dismiss. Specifically, Judge Otero found that the School District denied Aja a FAPE program from August 21, 2002 (the date of the first IEP following the 2002 SEHO Decision) through January 29, 2004 (the date of the 2004 SEHO Decision).

As discussed above, Defendant's view is that Plaintiffs should only be able to recover fees through the first post-2002 SEHO decision IEP meeting - that is, through August 21, 2002. As is apparent from the litigation that went before Judge Otero, however, this August 21, 2002 meeting did not adequately deal with the problems identified by the 2002 SEHO Decision. Plaintiffs correctly contend that the latter IEP meeting (in May 2003), as well as efforts after May 2003 to enforce the IEP put in place in May 2003, constitute work attempting to enforce the 2002 SEHO decision. However, the 2004 SEHO Decision is the subject of the proceeding before Judge Otero. Accordingly, all fees incurred on or after the date of the 2004 SEHO Decision – even if they do relate back to enforcement of the 2002 SEHO decision – more properly belong in the fees motion that Judge Otero will hear if the Ninth Circuit affirms his decision. The Court thus orders fees incurred on or after January 24, 2004, the date of the 2004 SEHO decision, to be deducted from the fee award. Fees incurred between the 2002 SEHO decision and the 2004 SEHO decision, however, may be included in the fee award.

///

///

///

III. EXPERT FEES

In the January Order, the Court stayed the motion for fees as it pertained to Plaintiff's recovery of expert fees, pending the Supreme Court's decision on this question in Arlington Central School District Board of Education v. Murphy, 126 S. Ct. 2455 (2006). The Supreme Court has since held that plaintiffs may not recover expert fees under the IDEA. Id. at 2459-63. Accordingly, the Court DENIES Plaintiffs' request for expert fees.

IV. CONCLUSION

The Court ORDERS that the requested fee award be reduced by (1) the fees incurred in connection with the Westmark settlement; and (2) the fees sought by Plaintiffs that were incurred on or after January 24, 2004. The Court DENIES Plaintiffs' motion for fees as it pertains to expert fees.

IT SO ORDERED.

DATED: 8/2/06

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE